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Supreme Court, U.S.
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No. 89-55455

In the Supreme Court of the United States

October Term, 1990

SANTA MONICA CULINARY WELFARE FUND, CHARLES A. CONINE and VICTOR VALENZUELA,

Respondents,

v.

MIRAMAR HOTEL CORPORATION,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 *U.S.C.* § 1001 *et. seq.* as amended (1988), give the trustees of a Health and Welfare Fund ("The Fund") the right to conduct an audit of a contributing employer's payroll records in the absence of any contractual agreement to conduct such an audit?

2. Whether a collective bargaining agreement which limits the employer's obligation to the Fund to the making of benefit contributions and not otherwise, is enforceable in accordance with its terms regardless of the provisions of ERISA.

3. Whether, under the provisions of ERISA and the terms of a written Trust Agreement, an employer who only makes contributions to a Fund is automatically bound by the terms of the Trust Agreement, where the Trust Agreement defines covered employers as being those who "by contract with the Union, have agreed to be bound" and where the Employer did not so agree?

4. Whether the Ninth Circuit Court of Appeals, in reversing a summary judgment granted by the District Court, can decide the merits of this case, including factual issues relating to the Employer's "intention" in entering into a collective bargaining agreement, thereby preventing a trial on the merits, where there is no evidence in the record of the Employer's "intent" as to the issues decided by the Court other than the written collective bargaining agreement?

LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Ninth Circuit are listed in the caption herein.

Miramar Hotel Corporation is 100% owned by Fujita Corporation USA, a California corporation. There are no subsidiary companies of Miramar Hotel Corporation.

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No. 89-55455

In the Supreme Court of the United States

October Term, 1990

SANTA MONICA CULINARY WELFARE FUND, CHARLES A. CONINE and VICTOR VALENZUELA,

Respondents,

v.

MIRAMAR HOTEL CORPORATION,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Miramar Hotel Corporation, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit filed December 12, 1990.

I.

OPINIONS BELOW

The published 2-1 Opinion of the Court of Appeals for the Ninth Circuit (App. A, infra, A1-A12) is reported at 920 F. 2d 1491 (9th Cir. 1990). The Order of the

United States District Court for the Central District of California (App. B, infra, B1-B6) is not reported.

II.

JURISDICTION

The published Opinion of the Court of Appeals (App. A) was filed on December 12, 1990. A petition for rehearing was denied on February 7, 1991 (App. C, infra, C1). The jurisdiction of this Court is invoked under 28 *U.S.C.* § 1254(1).

III.

STATUTORY PROVISIONS INVOLVED

1. Section 404 of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, Title I, 88 Stat. 877, as amended by Section 309 of Pub. L. 96-364, Title III, 94 Stat. 1296, September 26, 1980, codified at 29 *U.S.C.* § 1104(a)(1)(D), provided:

> "Subject to Sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and — * * *
>
> > (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter."

2. Section 502 of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, Title I, 88 Stat. 891, as amended in 1980 by Section 306(b) of Pub. L. 96-364, Title III, 94 Stat. 1295, codified at 29 *U.S.C.* § 1132(a)(1)(3), provided:

"A civil action may be brought — * * *

(3) by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan. . . ."

IV.

STATEMENT OF THE CASE

From August 1, 1978 through August 1, 1983 petitioner Miramar ("the Employer"), and Local 814 of the Hotel Employees and Restaurant Employees Union ("The Union") were parties to a written collective bargaining agreement dated April 1979 which required Miramar to make Health and Welfare benefit contributions to the Santa Monica Health and Welfare Fund on behalf of certain covered employees. The 1979 bargaining agreement contained a provision whereby Miramar agreed to adopt and become bound by the terms and provisions of a written Trust Agreement which governs The Fund, including a provision authorizing The Fund to audit the records of covered employers. The Trust Agreement defines covered employers as being ". . . such . . . employers who, *by contract with the Union, have agreed to be bound by the terms of this Trust Agreement and* to make contributions to The Fund . . . ." (emphasis added) This collective bargaining agreement expired on August 1, 1983.

Upon the imminent expiration of the 1979 bargaining agreement, negotiations between Miramar and the Union were conducted, resulting in the signing of a new

written collective bargaining agreement dated December 22, 1983, having a term of August 2, 1983 through July 31, 1988. The new negotiated bargaining agreement *deleted* the provision contained in the 1979 bargaining agreement whereby Miramar had agreed to adopt and be bound by the Trust Agreement. The new 1983 bargaining agreement also contained, in Article XIV, an express limitation on Miramar's obligations to the Fund, limited to the making of contributions, and further provided that:

> "*Section III*
> The foregoing is the extent of any and all of employer's obligations to the Santa Monica Culinary Welfare Fund, and otherwise under this Article XIV."

While the 1983 bargaining agreement was in effect and notwithstanding Section III, supra, The Fund demanded that Miramar submit to an audit of its payroll records for covered and noncovered employees. Miramar declined to submit to The Fund's audit demand. The Fund sued Miramar in the District Court for the Central District of California, in a "collection action" for unpaid fringe benefits (although, in fact, The Fund had no such claim) and to compel Miramar to submit to The Fund's audit demand. The District Court, by its order filed September 27, 1988 (App. B, infra, p.7b-12b) denied The Fund's Partial Summary Judgment Motion on the "audit issue", granted Miramar's Summary Judgment Motion on the "audit issue" and dismissed without prejudice The Fund's claim for unpaid contributions. The District Court relied on the Separate Opinion (concurring in part and dissenting in part) of Justice Stevens (joined by then Chief Justice Burger and then Justice Rehnquist) in *Central States v. Central*

Transport, Inc., 472 U.S. 559, 105 S.Ct.2833, 86 L.Ed. 2d 447 (1985) in concluding that the right to audit is a matter of contract, and since there was no such contract right in this case, the Fund did not have the right to audit Miramar's records. The basis for federal jurisdiction in the District Court was 29 *U.S.C.* § 1132(e)(1).

In reversing the summary judgment in favor of Miramar and in deciding that the Fund has the right to audit Miramar's records, the Court of Appeals, while acknowledging that ". . . the role of the trustees is generally defined by the trust documents, to the extent these documents are consistent with the provisions of ERISA . . . (Citations)" (citing *Central States*, supra, 472 U.S. at p.568 and 29 *U.S.C.* § 1104(a)(1)(D) of ERISA — App. A, infra, A6) nevertheless decided that: "the union agreement does not expressly disaffirm the Trust Agreement"; the restrictive provision of Article XIV, Section III "is silent on the rights and powers of the Trustees to audit Miramar's records"; "the Trust Agreement contemplates that contributing employers be *either* signatories or contributors under a collective bargaining agreement and be bound by the terms of the Trust Agreement."; and that "[i]f Miramar's employees are participants in The Fund, then it necessarily follows that Miramar is an employer under the Trust Agreement." (App. A, infra, A6-A7)

The Court of Appeals *did not* remand to the District Court for further proceedings, although noting that "normally, the intent of the parties in this situation is an issue for the trier of fact." (App. A, infra, A8) Rather, the Court *decided* that "The Trust Agreement gives the Trustees the right to audit a contributing employer's records. Miramar is a contributing employer and The

Fund has the right to audit Miramar's payroll records." (App. A, infra, A11-A12)

V.

REASONS FOR GRANTING THIS PETITION

This case presents issues of nation-wide importance, having substantial impact upon employers, trust funds and beneficiaries, participants and fiduciaries as well as their labor unions and management, as to the proper scope and authority of our Federal Courts in construing and enforcing collective bargaining agreements and trust instruments vis-a-vis the requirements of ERISA, in giving effect to the negotiated terms of such agreements, and in altering, amending and rewriting such agreements to provide different or new terms which were not included or which were deliberately omitted through negotiations. Additionally, the Court of Appeals' (9th Circuit) Opinion effectively overrules this Court's decision in *Central States*, supra, 472 U.S. 559, by the expediency of stating that the mere contribution by an employer to a Fund authorizes the Fund to audit the employer!

1. The Court of Appeals Acted Contrary to the Provisions of ERISA in Finding That Miramar Is Bound By the Trust Agreement.

The Court of Appeals' decision in the case at bar is in direct and irreconcilable conflict with the specific language of the Trust Agreement, and is contrary to the provisions of 29 *U.S.C.* § 1104(a)(1)(D) and the pronouncements of this Court in *Central States*, supra, that trustees are required to act in accordance with the trust documents, to the extent they are consistent with the provisions of ERISA. (*Central States*, 472 U.S. at 568) The provisions of ERISA itself do not require or

authorize trustees to audit an employer's records. Sixth Circuit Court of Appeals' opinion in *Central States*, supra, 698 F. 2d 802, 805 (6th Cir. 1983), reversed by the Supreme Court in 472 U.S. 559; separate opinion in *Central States*, supra, 472 U.S. 559, 583, (to the effect that the right to audit is one which must be granted, if at all, by contract.)

In deciding that Miramar is bound to the terms of the Trust Agreement, including its audit provisions, the Court of Appeals has failed to give effect to the clear and unambiguous language of the Trust Agreement, in violation of ERISA § 1104(a)(1)(D) and has in effect overruled this Court's decision in *Central States*, supra, by judicially legislating that contributing to a "Fund" automatically includes audit rights against the Employer.

The dissenting opinion of Circuit Judge Beezer in the case at bench (App. A, infra, A12) sets forth the proper analysis of Miramar's obligation to submit to the Fund's audit demand:

> "Under the trust instrument, "employers" include those 'who, by *contract with the Union, have agreed to be bound by the terms of this Trust Agreement and to make contributions to the Fund*.' Thus, employers must both make contributions and agree to be bound by the terms of the Trust Agreement. Here, the collective bargaining agreement contains no reference which binds the employer to the audit terms of the Trust Agreement. Because Miramar never agreed to be bound by the terms of the Trust Agreement 'by contract with the Union' it is not required to submit to an audit."

2. In Deciding That Miramar Is Bound By the Trust Agreement, the Court of Appeals Has Rewritten the Contents of the Active Bargaining Agreement and Trust Agreement, In Derogation of Federal Law.

It has been held that the purpose of ERISA is "to protect contractually defined benefits". (*Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 124, 148, 87 L. Ed. 2d 96 (1985)). It has also been held that the common law of trusts was invoked by Congress to define the scope of authority and responsibility of trustees and other fiduciaries under ERISA. (*Central States*, supra, 472 U.S. at 570)

In *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562, 576 (1982), the Supreme Court held that the Federal courts could not review for reasonableness the provisions of a collective bargaining agreement relative to details of coverage of an employee benefit trust fund, concluding that:

> "[W]hen neither the collective bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract."

This is in line with general rules of contract construction and enforcement: "a court is not free to save parties from what it believes are contractual mistakes or oversights." *Towers Hotel Corp. v. Rimmel*, 871 F 2d 766, 773 (8th Cir. 1989); "It is no appropriate part of judicial business to rewrite contracts freely entered into between sophisticated business entities." *Mathewson Corp. v. Allied Marine Industries*, 827 F

2d 856 (1st Cir. 1987); a freely negotiated agreement "unaffected by fraud, undue influence or overweening bargaining power, such as that involved here, should be given full effect." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-13, 92 S.Ct. 1907 (1971).

In the case at bench, there is no evidence whatsoever and no finding by the Court of Appeals that either the collective bargaining agreement or the Trust Agreement violate any command of Congress, or that either agreement is not consistent with the provisions of ERISA. Therefore, the Court of Appeals had no authority to alter or modify the terms of these agreements, which the Court did when it decided that Miramar was bound by the terms of the Trust Agreement because the Agreement "contemplates that contributing employers be *either* signatories *or* contributors under a collective bargaining agreement and be bound to the terms of the Trust Agreement" (App. A, infra, A7), while *under the terms of the Trust Agreement* itself, covered employers were those who were signatories to the Trust Agreement or "who, *by contract with the Union, have agreed to be bound by the terms of this Trust Agreement and* to make contributions to the Fund. . . ." (emphasis added) (App. A., infra, A6-A7)

This vice is exacerbated where, as here, the uncontradicted evidence shows that Miramar and the Union negotiated *the elimination* of the provision contained in the prior agreement, whereby Miramar had agreed to be bound by the terms of the trust instrument (including the audit provision) and where the new bargaining agreement specifically limited Miramar's obligation to The Fund to the making of contributions, and further provided that "The foregoing is the extent of any and all of employer's obligations to the Santa

Monica Culinary Welfare Fund, and otherwise under this Article XIV." (App. A, infra, A4-A5)

In *Ruthlein v. Armour & Company*, 377 F. Supp. 506, 510, (W.D. P.A. 1974) the Court held that where a collective bargaining agreement specified that certain named employees in a pension plan would not be terminated, this provision could not be expanded or altered by judicial interpretation:

> "An ancient maxim of contract construction '**expressio unius est exlusio alterius**' provides that the expression in a contract of things of a class implies the exclusion of all not expressed, even though all would have been implied had none been expressed. 17A C.J.S. Contract § 312; 17 Am.Jur.2d Contracts § 255. Under this doctrine of contract interpretation the fact that two specific employees were named for continued participation in the Armour and Company Pension Plan negates any argument that the remainder of the Teamster Unit participants in the Armour Plan would continue to participate in that plan."

To the same effect, see *Portland Web Pressmen's Union Local No. 17 v. Oregonian Pub. Co.*, 188 F. Supp. 859, 865 (D.C.Ore. 1960), *aff.* 9th cir. 286 F 2d 4, *cert. den.* 366 U.S. 912.

The above cited maxim of contract construction and the common law of contracts and trust which have been applied to interpret labor agreements which are subject to the provisions of ERISA prohibit the altering, amending, changing or adding of material provisions to the Collective Bargaining Agreement and Trust Agreement in the manner in which the Court of Appeals has done.

3. The Collective Bargaining Agreement's Mere Reference to the Fund, In Connection With the Miramar's Obligation to Make Contributions, Is No Basis For Concluding That Miramar Intended to Be Bound By A Trust Agreement To Which It Is Not A Signatory.

In deciding that Miramar was subject to the terms of the Trust Agreement, the Court of Appeals stated (App. A, infra, A7-A8):

> ". . . While Miramar is not a signatory to the Trust Agreement, it is undisputed that it contributed to the Fund and intended its employees to receive the benefits from the Fund. Miramar would not make contributions if it did not intend its employees to receive benefits from the Fund.[1] *If Miramar's employees are participants in the Fund, then it necessarily follows that Miramar is an employer under the Trust Agreement.* * * *
>
> There is no contention that Miramar agreed to make significant contributions to the Fund but did not intend its employees to be covered thereunder. It is clear that *by making contributions to the Fund, Miramar intended its employees to receive benefits from the Fund. Once Miramar intended its employees to be covered by the Fund, the Trust Agreement governing the Fund requires Miramar to be bound to its terms.*" (Emphasis added)

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[1]Incongruously, the Court of Appeals (9th Circuit) ignores the fact that the Union members, not the Miramar's employees, receive the benefits of the Fund under a collective bargaining agreement.

There is no evidence in the record to support the statements above quoted as to Miramar's "intentions", such statements being nothing more than sheer speculation. Furthermore, these conclusions cannot be supported by the mere fact that the 1983 bargaining agreement refers to the Fund in connection with Miramar's obligation to make contributions.

In *RCA Corp. v. Local 241, etc.*, 700 Fed. 2d 921, 937, (3d Cir. 1983), the Court held that "The mere mentioning of the Retirement Plan in the General [collective bargaining] Agreement is insufficient reason to construe the Retirement Plan as part and parcel of the General Agreement."

The *RCA Corp.* case was quoted and followed in *Printing Specialties, Local 680 v. Nabisco Brands*, 833 F 2d 102, 105, (7th Cir. 1987), where it was held that the mere mention in the collective bargaining agreement of a Pension Plan, did not bring pension disputes under the scope of the collective bargaining agreement.

The result of this Court of Appeals' Opinion, if left to stand, is to overrule *Central States*, supra, by the simple expediency of holding that any Employer who contributes to a Fund authorizes the Fund to audit the employer.

In the case at bench, the Court of Appeals acted improperly and without authority in concluding that Miramar is bound by the terms of the Trust Agreement merely because Miramar agreed to make contributions to the Fund.

4. The Court of Appeals Exceeded Its Authority In Deciding The Merits, After Reversing a Summary Judgment.

In reversing the summary judgment in favor of Miramar, the Court of Appeals decided the merits of the case (App. A, infra, A8):

> "Normally, the intent of the parties in this situation is an issue for the trier of fact . . . . However, we need not remand for this purpose. There is no contention that Miramar agreed to make significant contributions to The Fund but did not intend its employees to be covered thereunder. It is clear that by making contributions to The Fund, Miramar intended its employees to receive benefits from The Fund. Once Miramar intended its employees to be covered by The Fund, the Trust Agreement governing The Fund requires Miramar to be bound to its terms."

In deciding the merits upon the reversal of a summary judgment, the Court has acted contrary to recognized principles of law by depriving Miramar of the right to a trial on the merits *Sartor v. Arkansas Gas Corporation*, 321 U.S. 620, 627, 64 S. Ct. 724, 88 L. Ed. 967 (1943), and contrary to the purpose and intent of *Federal Rule of Civil Procedure*, Rule 56, which only permits a judgment if the moving party is entitled to a "judgment as a *matter of law* upon genuinely indisputable material facts." *United States v. Bills*, 639 F. Supp. 825, 829 (1986).

In addition, the Court's decision is based upon nothing more than mere speculation as to the presumed intent of Miramar in making contributions to The Fund, as

there is no evidence whatsoever in the record to support the Court's conclusions.[2]

To the contrary, if there is any "intention" of Miramar which should have been given effect by the Court of Appeals, it is the intention which is reflected in the *deletion* of the provision contained in the prior collective bargaining agreement whereby Miramar had agreed to be bound by the terms of the Trust Agreement, and in the *addition* of Section III of Article XIV in the 1983 bargaining agreement. (App. A, infra, A4)

Although the Court of Appeals characterized Section III of Article XIV of the bargaining agreement as being "unclear" (App. A, infra, A8), there is nothing "unclear" about it.[3]

Section III specifically refers to Article XIV, entitled "Health and Welfare", which sets forth Miramar's obligation to make contributions ~~to the~~ Health and Welfare Fund (Section I), and the procedure for implementing any increase in contributions (Section II).

Section III *clearly* states the *negotiated* intention of Miramar and the Union that the obligations set forth in Sections I and II of Article XIV are *the sole obligations undertaken by Miramar to the Fund*.

The context of Section III clearly defines the meaning and intention of that section, as limiting the obligations of Miramar vis-a-vis the Fund, to those specifically enumerated in Article XIV, Sections I and II.

The Court of Appeals comments that Section III of Article XIV "does not expressly disaffirm the Trust

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[2]The Court of Appeals (9th Circuit) refers to nothing in the record.

[3]The Court of Appeals (9th Circuit) refers to nothing in the record.

Agreement . . ." and that "the provision is silent on the rights and powers of the Trustees to audit Miramar's records." (App. A, infra, A8)[4]

Why would Miramar need to "disaffirm" the Trust Agreement (a negative act), when, by its own terms, the Trust Agreement provides that an employer is bound only if it agrees by contract with the Union to be bound (an affirmative act)?

Why would the collective bargaining agreement address the "rights and powers of the Trustees to audit Miramar's records", when any such right derives from the Trust Agreement, to which Miramar did not agree to be bound, and when both Miramar and the Union have negotiated and agreed that the extent of Miramar's obligations to the Fund is to make contributions?

The Court of Appeals exceeded its authority in deciding (incorrectly) factual issues of intent after reversing a summary judgment involving only legal issues of contract interpretation vis-a-vis the requirements and provisions of ERISA. The dissent clearly exposes the majority's efforts to re-write the collective bargaining agreement, ERISA and in effect to overrule *Central States*, supra.

VI.

CONCLUSION

Petitioner Miramar Hotel Corporation respectfully submits that the issues here presented, which are of great national concern, should be subject to the guidance of

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[4]On the contrary, Section III of Article XIV expressly states that "the foregoing is the extent of any and all of Employer's obligations to the . . . Fund, and otherwise under Article XIV."

the highest court in the land, and therefore, that this Petition be granted.

DATED: May 6, 1991

Respectfully submitted,

William G. Wells

Attorney for Petitioner
MIRAMAR HOTEL CORPORATION

APPENDICES

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SANTA MONICA CULINARY WELFARE FUND; CHARLES A. CONINE; VICTOR VALENZUELA,
Plaintiffs-Appellants,
v.
MIRAMAR HOTEL CORPORATION,
Defendant-Appellee.

No. 89-55455
D.C. No. CV-88-1674-SVW
OPINION

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted
June 7, 1990—Pasadena, California

Filed December 12, 1990

Before: Procter Hug, Jr., Robert Boochever and Robert R. Beezer, Circuit Judges.

Opinion by Judge Hug; Dissent by Judge Beezer

SUMMARY

ERISA/Labor

Reversing a district court judgment, the court of appeals held that, under the existing collective bargaining agreement, an employer making contributions to an employee benefit

plan governed by the LMRA and ERISA was subject to a payroll audit under the terms of the trust agreement.

Appellant Santa Monica Culinary Welfare Fund requested to audit the payroll records of the Miramar Hotel Corporation, a contributing employer to the Fund. Contributions to the Fund were required under a collective bargaining agreement between the employer and the union. However, the CBA did not specifically incorporate the terms of the trust agreement, including the Fund's right to audit the records of the employers. The CBA was silent on the rights and duties of the Fund's trustees. The Fund's request to conduct an audit was to ensure Miramar's compliance in contributing to the Fund. The district court denied the Fund's request for an audit.

[1] The court did not need to decide whether ERISA conferred upon the Fund the right to audit because the trust agreement gave the Fund the right to audit Miramar's records, despite the fact that the CBA was silent on the issue. [2] Here, the trust agreement establishing the Fund contemplated that employers who contributed to the Fund were bound by the terms of the agreement. [3] If Miramar's employees were participants in the Fund, then it necessarily followed that Miramar was an employer under the trust agreement. Because the trust agreement contemplated that contributing employers be either signatories or contributors under a CBA and bound by the terms of the trust agreement, Miramar and its employees could not receive the benefits of the Fund yet escape its attendant burdens, such as an audit of the employer's records. [4] Once Miramar intended its employees to be covered by the Fund, the trust agreement governing the Fund required Miramar to be bound to its terms. [5] If consistent with ERISA, the trust agreement gave the trustees the right to audit the employer's books and records, and governed the scope of the trustees' rights and duties. [6] The fact that the trustees had no existing claim for contribution, nor any information that Miramar did not

make the required contributions, was not an obstacle to the trustees' right to audit in this case. [7] However, the court declined to award the Fund attorneys' fees and costs because Miramar's refusal to submit to an audit was not done in bad faith. Nor was Miramar's conduct of the sort that required others' deterrence. Miramar's position was not untenable.

Dissenting, Judge Beezer was of the opinion that because Miramar never agreed to be bound by the terms of the trust agreement by contract with the union, it was not required to submit to an audit.

COUNSEL

Henry M. Willis, Schwartz, Steinsapir, Dohrmann & Sommers, Los Angeles, California, for the plaintiffs-appellants.

Gerald M. Siegel, Santa Monica, California, for the defendant-appellee.

OPINION

HUG, Circuit Judge:

This action arises from a request by the Santa Monica Culinary Welfare Fund (the "Fund") to audit the payroll records of the Miramar Hotel Corporation ("Miramar"), a contributing employer to the Fund. Miramar refused to submit to an audit, claiming that under the collective bargaining agreement its only duty to the Fund was to make the agreed upon contributions. The district court agreed with Miramar and refused the Fund's request. Because we find that the Fund had the right to audit Miramar's payroll records, we reverse.

I.

The appellants in this action are the Santa Monica Culinary Welfare Fund and two of its trustees, Charles A. Conine and

Victor Valenzuela (the "Trustees"). The Fund is a multi-employer employee benefit plan governed by section 302(c)(5) of the Labor Management Relations Act, 1947, 29 U.S.C. § 186(c)(5), and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, as amended (1988). The Fund was created by Local 814 of the Hotel Employees and Restaurants Employees' Union ("the Union") for the benefit of designated employees.

As required under ERISA, the Fund was established pursuant to a written Trust Agreement. The Trust Agreement authorizes the Fund "at any time" to question both the sufficiency and accuracy of employer contributions. The Trust Agreement further authorizes the Fund to "from time to time" audit the records of employers.

From August 1, 1978 through August 1, 1983, the Union and Miramar were parties to a collective bargaining agreement which required Miramar to make contributions to the Fund on behalf of certain Union-represented employees. The agreement also contained a provision adopting the terms of the Trust Agreement that established the Fund.

A second collective bargaining agreement between the Union and Miramar went into effect August 2, 1983 through July 31, 1988. Like the first agreement, this agreement also established that Miramar would contribute a set amount to the Fund. However, unlike the first agreement, the second collective bargaining agreement did not specifically incorporate the terms of the Trust Agreement. After specifying the amount of contributions Miramar was required to make to the Fund, the collective bargaining agreement contained the following clause:

> The foregoing is the extent of any and all of employer's obligations to the Santa Monica Culinary Welfare Fund, and otherwise under this Article.

The collective bargaining agreement is silent on the rights and duties of the Fund's Trustees.

While the second collective bargaining agreement was in effect, an auditor selected by the Trustees sought to audit the payroll records of Miramar. Like many other employee trust funds, the Fund relies on the employer's self-reporting and conducts periodic audits to ensure the employer's compliance with its contributing obligations. The Fund's decision to have an audit conducted was part of its program to ensure Miramar's compliance with its obligations to contribute to the Fund.

Miramar refused to schedule an audit. The Fund brought an action to compel the audit and seek any delinquent contributions. The district court denied the Fund's request. This appeal followed.[1] We reverse.

II.

We review *de novo* the construction of collective bargaining agreements and employee benefit plans. *Operating Eng'r Pension Trust v. B&E Backhoe, Inc.*, 911 F.2d 1347, 1351 (9th Cir. 1990).

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[1]The district court originally granted summary judgment for Miramar on the Fund's audit claim and dismissed the Funds's collection claim without prejudice. After the Fund timely appealed from this order, its appeal was dismissed without prejudice because it was premature. In an amended judgment, the district court then certified the audit claim pursuant to Fed. R. Civ. P. 54(b), but made no mention of the claim for unpaid contributions.

Miramar argues that certification under Rule 54(b) was improper and that we are therefore without jurisdiction to hear this appeal. Miramar's argument is meritless. Two distinct claims were alleged, one of which is certified under Rule 54(b). Even if we were to consider the other claim as having been dismissed with prejudice, we would have jurisdiction over the district court's final judgment under 28 U.S.C. § 1291.

III.

[1] Miramar maintains that the Fund is without the power to audit because the collective bargaining agreement between it and the Union failed to incorporate the terms of the Trust Agreement. The Fund contends that ERISA gives it the right to audit Miramar's records even though the collective bargaining agreement does not expressly authorize the Fund to audit Miramar's records. We do not decide whether ERISA confers upon the Fund the right to audit because the Trust Agreement gives the Fund the right to audit Miramar's records, despite the fact that the collective bargaining agreement is silent on the issue.

ERISA requires that employee benefit plans such as the one here be established as written formal trusts. 29 U.S.C. § 1103 (1988). *See also NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981). The Trust Agreement in this case gives the Fund the right to conduct an audit of employer records. Under section 404(a)(1)(D) of ERISA, the trustees of an employee benefit plan are required to act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter." 29 U.S.C. § 1104(a)(1)(D) (1988). Therefore, the role of the trustees is generally defined by the trust documents, to the extent these documents are consistent with the provisions of ERISA. *Central States Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 568 (1985). *See also Retirement Fund Trust v. Franchise Tax Bd.*, 909 F.2d 1266, 1280 (9th Cir. 1990); *Board of Trustees of the Watsonville Frozen Food Welfare Trust Fund v. California Coop. Creamery*, 877 F.2d 1415, 1420 (9th Cir. 1989).

[2] Here, the Trust Agreement establishing the Fund contemplates that employers who contribute to the Fund are bound by the terms of the Trust Agreement. In defining the term "Employer," Art. II, Section 2.01(6) of the Trust Agreement states:

> The term "Employer" means the Employer signatory hereto . . . and such other employers who, by contract with the Union, have agreed to be bound by the terms of this Trust Agreement *and* to make contributions to the Fund equal to and on the same basis and under the same conditions as those required to be made by the employers signatory hereto.

(Emphasis added). The Trust Agreement further provides that an "Employee" is

> Any person within the jurisdiction of the Union employed by an Employer bound by this Agreement, covered by a collective bargaining agreement between his or her Employer and the Union.

Further, Article IX of the Trust Agreement authorizes only the Fund's Trustees to amend the Trust Agreement.

These provisions make it clear that when establishing the Fund, the Trustees intended that employer and employee participants were bound by the terms of the Trust Agreement. While Miramar is not a signatory to the Trust Agreement, it is undisputed that it contributed to the Fund and intended its employees to receive the benefits from the Fund. Miramar would not make contributions if it did not intend its employees to receive benefits from the Fund.

[3] If Miramar's employees are participants in the Fund, then it necessarily follows that Miramar is an employer under the Trust Agreement. Miramar cannot have it both ways. The Trust Agreement contemplates that contributing employers be either signatories or contributors under a collective bargaining agreement and be bound to the terms of the Trust Agreement. Miramar and its employees cannot receive the benefits of the Fund yet escape its attendant burdens, in this

case, the provision of the Trust Agreement permitting the Trustees to audit an employer's books and records.

Miramar maintains that the provision of the collective bargaining agreement specifying that the "foregoing is the extent of any and all of employer's obligations" to the Fund means that Miramar need only contribute to the Fund and should not be required to submit to the requested audit. We disagree.

First, the precise meaning of this provision is unclear. The provision simply states that the "foregoing" is the extent of Miramar's obligations. The provision does not expressly disaffirm the Trust Agreement. Moreover, the provision is silent on the rights and powers of the Trustees to audit Miramar's records.

"Where a contract's meaning is not clear on its face, its interpretation depends upon the parties' intent at the time it was executed." *Laborers Health & Welfare Trust Fund v. Kaufman & Broad of N. California, Inc.*, 707 F.2d 412, 418 (9th Cir. 1983). Here, the only relevant evidence submitted was a declaration from Miramar's president stating that the second collective bargaining agreement was "negotiated." This evidence does not assist our interpretation of this provision.

[4] Normally, the intent of the parties in this situation is an issue for the trier of fact. *Id.* However, we need not remand for this purpose. There is no contention that Miramar agreed to make significant contributions to the Fund but did not intend its employees to be covered thereunder. It is clear that by making contributions to the Fund, Miramar intended its employees to receive benefits from the Fund. Once Miramar intended its employees to be covered by the Fund, the Trust Agreement governing the Fund requires Miramar to be bound to its terms.

[5] The Trust Agreement gives the Trustees the right to audit an employer's books and records. The Supreme Court

has made clear that the trust documents, if consistent with the ERISA statute, govern the scope of the trustees' rights and duties. *Central States*, 472 U.S. at 568. If the provision at issue is read as interfering with the Fund's right to audit Miramar's books, we would be altering the trust documents. Such a holding is contrary to Supreme Court and circuit authority stressing the independent relationship between a trust fund, an employer, and a union. *See Central States*, 472 U.S. at 575-77 (a trust fund need not rely on a union to monitor employer contributions); *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 370-76 (1984) (outlining the differing interests between a union, employer, and trust fund within the context of arbitration); *Amax*, 453 U.S. at 329 ("a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties"); *Hawkins v. Bennett*, 704 F.2d 1157, 1159 (9th Cir. 1983) ("The trust fund is independent of the collective bargaining agreement between the parties.").

This authority makes it clear that

> neither an employer nor a union, singly or together, can alter the terms of a trust instrument such as the one involved in this case unless the power to do so was reserved when the trust was created or properly amended.

Sinai Hosp. of Baltimore, Inc. v. National Benefit Fund for Hosp. & Health Care Employees, 697 F.2d 562, 567 (4th Cir. 1982) (citing *NLRB v. Driver Salesmen*, 670 F.2d 855 (9th Cir. 1982)). No such power was reserved in the Trust Agreement, and it has not been so amended.

Miramar's final contention is that a random audit is impermissible because there is no contractual right to audit, no claim for contributions, no alleged breach of a collective bargaining agreement, nor any other cause which would give rise

to a random audit. This argument does not alter our conclusion.

[6] We have already held that the Trustees' right to audit in this case is established by the Trust Agreement when, as here, the employer contributes to the Fund with the intent that its employees receive the Fund's benefits. The fact that the Trustees have no existing claim for contribution, nor any information that Miramar may not have made the required contributions is not an obstacle to the Trustees' right to audit in this case. In *Central States,* 472 U.S. at 581, the Court held that the trustees had the right to audit, even though the trustees had neither a claim for delinquent contributions, nor did they allege that the employer breached its obligation to contribute.

Miramar cites to the circuit opinion reversed by the Court in *Central States* to support its proposition that the Fund must show some type of cause before auditing its records. *See Central States Pension Fund v. Central Transp., Inc.*, 698 F.2d 802 (6th Cir. 1983), *rev'd,* 472 U.S. 559 (1985). Because the Sixth Circuit noted that the fund's request to audit was triggered by "instances of apparent underreporting," Miramar maintains that the Fund in this case must show similar triggering events to support its audit request. *Id.* at 805. Miramar missed the point made by the Supreme Court.

In reversing this opinion, the Court addressed the fund's audit request as part of a system of "*random* audits of the records of participating employers." *Central States,* 472 U.S. at 563 (emphasis added). The Court further noted that the audit was "part of a program of 'periodic reviews of participating employer contributions for the benefit of Plan Participants and their Beneficiaries.' " *Id.* (citation omitted). This is the same justification given by the Fund here. The Court in *Central States* stressed that no such triggering event is required—this is the point of Section IV of that opinion. *Id.* at 574-81.

IV.

The Fund asks for attorneys' fees. 29 U.S.C. § 1132(g)(1) (1988) authorizes the award of fees in the court's discretion. *Smith v. Retirement Fund Trust of Plumbing*, 857 F.2d 587, 592 (9th Cir. 1988). Our discretion is guided by the following factors, among others:

> (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing party to satisfy an award of fees; (3) whether an award of fees against the opposing party would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions.

Hummell v. S.E. Rykoff & Co., 634 F.2d 446, 453 (9th Cir. 1980).

[7] There is no indication that Miramar is incapable of satisfying an award of fees. Moreover, the Fund brought this case to "benefit all participants and beneficiaries of an ERISA plan" and "to resolve a significant legal question regarding ERISA." *Id.* These two factors militate in favor of awarding the Fund fees. Nevertheless, we decline to do so. The Fund does not claim that Miramar's refusal to submit to an audit was done in bad faith. In addition, Miramar's conduct was not of the sort that requires us to deter others from acting similarly in the future. Finally, Miramar's position that it need not submit to an audit because the collective bargaining agreement was silent, although ultimately unsuccessful, was not untenable. Under these circumstances, we decline to award the Fund fees and costs.

V.

The Trust Agreement gives the Trustees the right to audit a contributing employer's records. Miramar is a contributing

employer, and the Fund has the right to audit Miramar's payroll records. We make no award of attorneys' fees.

REVERSED.

BEEZER, Circuit Judge, dissenting:

I do not think an employer is bound by the terms of the Trust Agreement if it only makes contributions on behalf of its employees. Under the trust instrument, "employers" include those "who, by contract with the Union, have agreed to be bound by the terms of this Trust Agreement and to make contributions to the Fund." Thus, employers must both make contributions *and* agree to be bound by the terms of the Trust Agreement. Here, the collective bargaining agreement contains no reference which binds the employer to the audit terms of the Trust Agreement. Because Miramar never agreed to be bound by the terms of the Trust Agreement "by contract with the Union" it is not required to submit to an audit.

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FILED
SEP 27 1988
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT
BY DEPUTY

ENTERED
CLERK, U.S. DISTRICT COURT
SEP 28 1988
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SANTA MONICA CULINARY WELFARE FUND, CHARLES A. and VICTOR VALENZUELA,

Plaintiffs,

v.

MIRAMAR HOTEL CORP.,
Defendant.

CASE No.
CV 88-1674
SVW (BX)
ORDER

Plaintiffs, the Santa Monica Culinary Welfare Fund (the Fund) and two of the members of the Fund's board of trustees, Charles A. Conine and Victor Valenzuela, commenced this ERISA action on May 29, 1988. The

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AS REQUIRED BY FRCP, RULE 77(d).

plaintiffs seek "unpaid fringe benefit contributions, liquidated damages, interest, attorneys' fees, audit costs and court costs owed to the Welfare Fund by defendant Company pursuant to a collective bargaining agreement, Trust Agreements, and § 515 of ERISA, 29 U.S.C. § 1145." This claim has two prongs. First, plaintiffs seek an Order compelling defendant to submit to an audit of its payroll records. Second, plaintiffs seek alleged unpaid contributions.

On June 23, defendant filed a motion for summary judgment. Plaintiffs thereafter moved for partial summary adjudication - and an Order compelling defendant to allow an audit of its payroll records. After several hearings and consideration of all the papers and pleadings in this action, the Court concludes that plaintiffs are not entitled to audit the defendant's payroll records. Therefore, for the reasons set forth herein, the Court DENIES plaintiff's motion for partial summary adjudication and an Order compelling an audit, and GRANTS defendant's motion for summary judgment to the extent it argues that plaintiffs are not entitled to an audit. Plaintiff's claim for unpaid contributions is DISMISSED without prejudice.

The following facts are without dispute. Plaintiff Fund is an express trust fund established through collective bargaining and governed by a written Trust Agreement. In order to provide health and welfare benefits for certain of its employees, defendant Miramar Hotel Corp. is obligated to contribute to the Fund pursuant to a collective bargaining agreement ("the CBA") between it and the Hotel and Employees and Restaurant Employees Union Local 814. Defendant has not executed the Trust Agreement establishing the Fund and the CBA does not expressly incorporate it by reference. The only requirement set forth in the CBA is that defendant make contributions to the Fund.

Article XIV of the CBA sets forth all of the provisions relating to contributions to the Fund. Section I of that Article contains the required contribution amounts. Section II discusses possible changes to the contribution amount. Finally, and most importantly, Section III states: "The foregoing is the extent of any and all of employers [sic] obligations to the Santa Monca Culinary Welfare Fund, and otherwise under this Article XIV." Thus, there is no provision which could even remotely be construed to allow for an audit. Indeed, if anything, the CBA implicitly precludes an audit by virtue of Section III of the Article XIV.

The Fund has requested that defendant agree to a payroll audit to determine whether defendant has reported and paid in full all contributions owed on behalf of all covered employees. Defendant has refused to agree to this audit. The sole issue for determination is whether, in the absence of any contractual language allowing an audit, or language requiring the keeping of certain records, an employer is required by ERISA or the common law of trusts to submit to an audit of its payroll records.

The factual setting of this case is not a common one. In almost all other cases, the collective bargaining agreement either contains a provision expressly allowing the fund to audit the payroll books of the signatory employer, or at least requires the keeping of certain records. In other cases, the collective bargaining agreement incorporates by reference the document establishing the trust fund which itself contains language allowing an audit or requiring the maintenance of records. Here, by contrast, there is no contractual obligation to allow an audit or to keep records. All defendant agreed to do by signing the collective

bargaining agreement is to make contributions to the fund.

Given the unique factual setting, it is not surprising that there is no authority directly on point. The Court finds one cases persuasive, however. In Central States v. Central Transport, Inc., 472 U.S. 559 (1985), the Supreme Court addressed the issue of "whether an employer who participates in a multiemployer benefit plan that is governed by [ERISA] must allow the plan to conduct an audit involving the records of employees who the employer denies are participants in the plan." Id. at 561. In reaching the conclusion that the employer must allow the audit, the Court first examined the documents governing the relationship between the funds and the employer. These documents, the Court found, clearly gave the trustees a right to counduct an audit. Id. at 565-68. The Court then examined the relevant provisions of ERISA and concluded that the audit sought by the plaintiff funds was consistent with the policies behind ERISA. Id. at 568-74. After rejecting a number of additional arguments against the right of the trustees to conduct an audit, the Court held that the trustees did have the right, under the trust documents, to conduct the audit requested. Id. at 582. It is clear that the Court's decision in Central States was dependent upon a finding that the trust documents at issue could be interpreted to give plaintiffs the right to audit defendant's books.

In a concurring opinion joined by then Chief Justice Burger and then Justice Rehnquist, Justice Stevens made a statement which, although dictum in a concurring opinion, is the only authority directly relevant to the issue in this case, and which, in the absence of any more persuasive authority, is given great weight by this Court.

Justice Stevens stated that, "[i]n [his] opinion, the right to conduct an audit of the kind involved in this case must be granted by contract; it is not conferred by ERISA itself." Id. at 583 (emphasis added). He then stated that his "disagreement with the Court is based on our differing interpretations of the particular contract documents in this case." Id. It is therefore the opinion of then Chief Justice Burger, then Justice Rehnquist, and Justice Stevens that the Central States decision is dependent upon the contract at issue in that particular case. As the concurring opinion states in its opening paragraph:

> If an employer who participates in a multiemployer benefit plan enters into an agreement that authorizes the trustees of the plan to conduct an audit of the employer's personnel records, such an agreement is not prohibited by ERISA. That is the proposition of law that I understand the Court to announce today and I agree with it.

Id. (emphasis added). It follows that where, as here, there is no contractual provision giving the plan trustees a right to an audit, or the right to demand and examine employee records, that plaintiff should not be entitled to the audit it seeks.

One additional fact aids the Court in reaching its conclusion in this case. At the hearing on these motions, the parties admitted that, in a prior agreement between the Fund and the defendant, there was a provision allowing the Fund to audit defendant's records. That such a provision was once a part of the contract and is now mysteriously absent further supports the finding that, in the absence of contractual language which could be interpreted to allow for a right of audit, no such

right should exist. Here, the parties were perfectly capable of drafting the proper language, as is demonstrated by the prior agreement. Having failed to insert such language in this agreement, the plaintiff must live with the consequences of its own oversight.

Accordingly, the Court finds that plaintiff is not entitled to audit defendant's payroll records and that plaintiff's motion for partial summary judgment is DENIED. Plaintiff's claim for unpaid contributions is DISMISSED without prejudice. Defendant's motion for summary judgment is GRANTED to the extent it argues that plaintiff is not entitled to an audit.

IT IS SO ORDERED.

DATED: Sept 22, 1988

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

FILED

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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SANTA MONICA CULINARY WELFARE FUND; CHARLES A. CONINE; VICTOR VALENZUELA, Plaintiffs-Appellants, v. MIRAMAR HOTEL CORPORATION, Defendant-Appellee.	No. 89-55455 D.C. No. CV-88-1674-SVW ORDER

Appeal from the United States District Court
for the Central District of California

Before: HUG, BOOCHEVER, and BEEZER, Circuit Judges.

Upon due consideration, Judges Hug and Boochever have voted to deny the petition for rehearing, and Judge Beezer has voted to grant the petition for rehearing. Judges Hug and Beezer have voted to reject the suggestion for rehearing en banc, and Judge Boochever has recommended rejection of the suggestion.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11852 Santa Monica Boulevard, Suite 3, Los Angeles, California 90025; that on May 2, 1991, I served the within *Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
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Washington, D.C. 20543
(By Express Mail: original and forty copies)

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San Francisco, California 94102

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Los Angeles, California 90010

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 2, 1991, at Los Angeles, California.

Betty J. Malloy
(Original signed)